United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7623-7625

In the

United States Court of Appeals

For the Second Circuit

Nos. 76-7623, 76-7624 and 76-7625

Howard D. Reagan and James E. Harris,

Plaintiffs-Appellants,

—against—

Battery Steamship Corporation as owner of the SS THUNDERHEAD,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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IN THE

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Nos. 76-7623, 76-7624 and 76-7625

HOWARD D. REAGAN and JAMES E. HARRIS,

Plaintiffs-Appellants,

—against—

BATTERY STEAMSHIP CORPORATION as owner of the SS THUNDERHEAD,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Issue Presented For Review

Plaintiffs' appeal from the final judgments of dismissal, with prejudice, directed by Honorable Charles L. Brieant, November 12, 1976 and entered November 15, 1976, dismissing their actions for failure to prosecute.

The sole issue is whether Judge Brieant abused his discretion by so dismissing plaintiffs' complaints.

Statement

Three (3) separate actions of the plaintiffs-appellants were dismissed by the District Court for failure to prosecute.

Two (2) of the actions were commenced by plaintiff-appellant Howard D. Reagan in 1969 and 1972, and the third action was commenced by plaintiff-appellant James E. Harris in 1972.

These eight and five year old seamens' actions were brought for alleged personal injuries arising from occurrences over ten (10) years ago in December 1966 on the same vessel.

Plaintiff-appellant Reagan has never appeared for his depositions.

No steps were taken by the plaintiffs to prosecute their lawsuits since 1973, and the plaintiffs have not come forward with any showing to excuse their total inaction and failure to prosecute, other than plaintiffs' counsel's failure to communicate with plaintiffs combined with law office problems (A30-33), neither of which constitutes excusable neglect.

Plaintiffs' statement that because the cases had been on the suspense calendar they had previously engaged in no dilatory tactics (Pltfs' Brief, p. 8) is unfounded. As the Court below explained, "The suspense calendar is for the convenience of the court. Litigants have no rights under those provisions" (A29).

Moreover in 1972 when defendant initially sought dismissal of the Reagan action, which the Court then denied without prejudice, the Court's order directed that following the release of plaintiff Reagan from prison "his at-

torneys shall notify defendant's attorneys within ten (10) days following such release." (A19). On September 7, 1976, however, the return day of the current motions seeking dismissal involved in this appeal, it was conceded by plaintiffs' counsel that Reagan had been released (A30) but this was never previously disclosed to defendant.* Furthermore, the record unequivocally shows that from September 7, 1976 when the motions at issue were served to the first hearing date of September 27, 1976, no diligent efforts were made by counsel to communicate with plaintiffs (A30). At the time the Court admonished plaintiffs' counsel that such inactivity would not absolve plaintiffs but would involve their counsel in a possible malpractice claim (A30, 31 and 32). Even so the Court, instead of dismissing the suits at that time as it would have been justified in doing, continued the motions until October 8, 1976. He cautioned counsel, however, that if on the adjourned date plaintiffs were not represented by an attorney and no desire to prosecute the case were shown, the Court would dismiss the claims. (A32).

On November 3, 1976 the final hearing date the Court, in granting the motions to dismiss, noted the contumacious conduct of plaintiffs in that they had failed to proceed in all respects notwithstanding the direction previously made by the Court formally and on the record. (A36)

It seems clear, therefore, that apart from the continued inactivity in these cases filed in 1969 and 1972, plaintiffs surely were given adequate time by the Court to take appropriate steps to avoid dismissal. From the time the defendant's motion was made on September 7, 1976 to the final hearing date on November 3, 1976 plaintiffs had al-

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* Pltfs' brief acknowledges that Reagan was released from Federal Prison toward the end of 1975 or early in 1976 (Pltfs' brief p. 3 fn.2).

most two months within which to correct their inactivity or come forth with a plausible and specific explanation, but instead chose to do nothing in violation of the lower court's admonition. In these circumstances, plaintiffs cannot be heard to complain that they were treated harshly nor that the lower court's actions constituted an abuse of discretion.

POINT I

Judge Brieant Did Not Abuse His Discretion In Dismissing the Actions For the Failure of Plaintiffs to Prosecute.

This Court has sustained dismissals of plaintiffs' actions on numerous occasions, even for more limited failures by plaintiffs to diligently prosecute.

Thus, in *Fischer* v. *Dover Steamship Co.*, 218 F.2d 682 (2nd Cir. 1955), this Court sustained the District Court's dismissal, with prejudice, under Rule 41(b), where the plaintiff, a seaman, did not present himself for deposition within six (6) months after the notice to depose him had been filed. In that case, counsel for plaintiff also sought to plead excusable neglect of counsel because a staff member in the office of plaintiff's counsel had failed to notice the deadline date to produce plaintiff. Commenting both on plaintiff's failure to appear and counsel's failure to produce him, this Court stated:

> "The plaintiff is in this dilemma: if, having brought suit, he failed for seven months to keep in reasonably close touch with his lawyer, his personal neglect was not absolved by the negligence of his lawyer: if, on the other hand, he was in touch with his lawyer who failed to produce him for deposition within that period, the lawyer's neglect was inexcusable. Of course, rea-

sonable allowance should be made for the wayfaring nature of the plaintiff's life. But in the absence of plausible and specific explanation, we think the court below is not shown to have been insensitive to that consideration."

In the present cases, at the hearing before District Judge Brieant on September 27, 1976, counsel for plaintiffs advised the Court that plaintiff Reagan had previously been released from prison, and that he was having office problems and had not communicated with plaintiffs. At that hearing, Judge Brieant warned counsel that none of the problems constituted excusable neglect but, nevertheless, he would continue the motions for two weeks "while you handle it properly" (A31). The Court stated:

"[The motions are adjourned to] October 8, 9:30. The motion is continued for all purposes until then. If [they are] not represented by an attorney and [do] not show a desire to prosecute on that date, I will dismiss the claims for failure to prosecute." (A32).

At the further adjourned hearing date of the three motions on November 3, 1976, neither counsel for plaintiffs nor either individual plaintiff appeared. At that time Judge Brieant granted the three motions to dismiss for failure to prosecute, and stated:

"Yes. I think they were here last time and, if I remember correctly, I had given an extension of time for them to resolve whatever difficulties there might be before I considered the matter again and I believe, if memory serves correctly, I had discussed the matter with the understanding that if the plaintiffs were not represented by attorneys and didn't appear on this continued date and did not show a desire to prosecute the

action that I would dismiss both the claims for failure to prosecute." (A35)

"All three motions are granted and the Court notes the default of the plaintiffs to proceed in all respects notwithstanding the direction previously made by the Court formally and on the record. All these three matters will be dismissed for failure to prosecute." (A36)

Plaintiffs acknowledge their failure to come forth with an adequate explanation for their inactivity, but urge for the first time on this appeal, and despite their default below, that defendant failed to show prejudice.

But F.R.C.P. 41(b) does not require a showing of prejudice by defendant to sustain the dismissal for failure to prosecute. As this Court has already stated:

"The operative condition of the Rule is lack of due diligence on the part of the plaintiff—not a showing by the defendant that it will be prejudiced by denial of its motion . . .". *Messenger* v. *United States*, 231 F.2d 328, 331 (2nd Cir. 1956).

And, where as here, there has been a ten year interval between the time of the occurrences sued upon and dismissal, prejudice can be presumed. *Demeulenaere* v. *Rockwell Manufacturing Company*, 312 F.2d 209 (2nd Cir. 1962); *Tubman* v. *Olympia Oil Corp.*, 276 F.2d 581 (2nd Cir. 1960); *Refior* v. *Lansing Drop Forge Co.*, 124 F.2d 440 (6th Cir. 1942). Plaintiffs further concede this in their brief, p. 8, fn. 4.

Plaintiffs cite two cases where this Court has "reluctantly reversed dismissals for failure to prosecute" (Pltfs' Brief, p. 5), but neither of those cases is in point.

In *Peterson* v. *Term Taxi Inc.*, 429 F.2d 888 (2nd Cir. 1970), plaintiff's absence from New York City over a weekend and his attorney's inability to reach him then, resulted in plaintiff appearing at Court about noon on Monday, ready and willing to proceed, only to find his case had been dismissed some time between 11:00 A.M. and the time of his arrival. Based on confused facts as to the timing of events on the morning of dismissal, the Court concluded that dismissal was not justified there because it was based only on "close inflexible attention to the docket."

In *Vindigni* v. *Meyer*, 441 F.2d 376 (2d Cir. 1971), plaintiff's attorney had "disappeared" and failed to respond to a conditional discovery order and failed to oppose a motion to dismiss. Plaintiff denied any knowledge of the order of dismissal. Finding that, defendant's attorneys knew of plaintiff's attorneys' disappearance and failed to personally notify plaintiff of the dismissal sought, this Court reversed, finding the facts distinguishable from *Fischer*, *supra*, p. 4.

In reversing, the Court again confirmed the validity of stating:

> "In reversing, we do not depart from the regular course of our decisions upholding discretionary orders or dismissal for failure to prosecute."

Clearly, the dismissal for want of prosecution amounted to no more than the exercise of discretion by the District Judge and was well within the power and duty of the courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases". *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962).

CONCLUSION

The Judgments of Dismissal Should Be Affirmed.

Dated: New York, New York
April 4, 1977.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that two (2) copies of the within appellee's brief were this date mailed to the following:

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